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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

PETITION FOR RECONSIDERATION

Rio Grande Broadcasting Company ("Petitioner") by its undersigned counsel herewith petitions for reconsideration in part of the Commission's action in the above proceeding, as set forth in its First Report and Order in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, released August 18, 1997, 63 FR 48615-33 (September 11, 1998). In support whereof, the following is shown:

1. In its First Report and Order the Commission adopted Rules to implement the revisions to the Communications Act occasioned by the Balanced Budget Act of 1997. Petitioner seeks reconsideration in part of the Commission's action, specifically with respect to those provisions of the First Report and Order which: (a) deny compensation to parties to pending comparative

licensing proceedings; (b) impose reserve price and minimum bid requirements; and (c) fail to relieve an applicant from the obligation to remit payment of a winning bid, where such applicant is the only qualified applicant;

I. The Commission's refusal to reimburse parties to comparative proceedings adversely impacted by its action is unlawful.

2. In the First Report and Order the Commission rejected claims asserted by parties to pending comparative hearing cases that the Commission's decision to utilize competitive bidding procedures to resolve pending hearing cases: was impermissibly retroactive (para. 44), was arbitrary and capricious (para. 45), constituted a denial of equal protection (para. 47) and/or due process (para. 48), did not constitute a taking under the 5th amendment (paras. 48-49) and/or required (whether legally or equitably) compensation to the parties to such proceedings who had relied to their detriment upon prior Commission policy and procedure. Petitioner herewith seeks reconsideration with respect to the Commission's conclusion that parties to pending comparative hearing cases, whose interests have been adversely impacted by the Commission's action, are not entitled to compensation, while preserving its right to seek judicial review of the Commission's other conclusions set forth at paragraphs 44-50 of the First Report and Order.

3. The Commission "declined" (at para. 50) to reimburse the legitimate and prudent expenses of parties who have participated in comparative hearing proceedings, which now will be terminated

in favor of resolution by competitive bidding. In doing so it asserts: (a) that parties to comparative proceedings had no "vested interest" in having the mutually exclusivity between their applications resolved by comparative hearing, (b) that the Commission has no "obligation" to do so and (c) that the limitation of the pool of eligible bidders to pending applicants serves to mitigate the financial losses they have incurred. However, the Commission has not seriously addressed any of these issues and its conclusions in each respect are unsupported and contrary to law.

4. The Commission's claim that any adverse economic impact has been mitigated by the restriction of the pool of eligible bidders to pending applicants is meritless. Initially, this limitation does not represent any effort to mitigate the damage suffered by pending applicants, but was instead explicitly mandated by Congress and was in any event legally necessitated by the applicants acquisition of vested interests, arising from their right to "cut-off" protection. See: McElroy Elec. Corp. v FCC, 86 F.3d 248, 257 (D.C. Cir. 1996); Florida Institute of Technology v. FCC, 952 F.2d 549, 554 (D.C. Cir. 1992). In addition, it is not clear how this limitation could be held to mitigate the adverse economic impact on applicants occasioned by the significant expenditures they have made at the invitation of the Commission in attempting to develop a record to permit the Commission to determine which applicant would best serve the public interest. Limiting the pool of potential bidders in these

cases does not return any portion of the time, effort or dollars which have been devoted to an exercise that Congress and the Commission have now been rendered utterly useless.

5. All of the parties to pending comparative proceedings filed their applications in response to the invitation of the Commission to apply, which invitation affirmatively represented that selection of a permitee would be made on by means of comparative hearing. Each of the parties, in accepting the Commission's invitation to apply, was induced to and did expend significant resources as a result. The Commission's conclusory contention that the parties to pending comparative proceedings have no "vested interest" in having those proceedings resolved on the basis of the procedures the Commission affirmatively represented it would utilize at the time they accepted the invitation to participate appears contrary to the weight of precedent.

6. Precedent confirms that applicants, by filing applications in response to the Commission's invitation and following its rules, acquire enforceable equitable interests based upon their reliance. See: McElroy Elec. Corp. v FCC, 86 F.3d 248, 257 (D.C. Cir. 1996); Florida Institute of Technology v. FCC, 952 F.2d 549, 554 (D.C. Cir. 1992); Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664, 674 (D.C. Cir. 1987). Even parties who are neither licensees or even applicants may acquire legally protected equitable interests in reliance upon Commission policy. See: National Association of Independent Television

Producers and Distributors v. FCC, 502 F.2d 249, 254-55 (2nd Cir. 1974) The Courts also have recognized the problem inherent in retroactive application of newly adopted regulation. Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986)("When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification of recission of the regulation can cause great mischief"). In cases where, as here, the element of retroactivity is present, the Courts have indicated that the most important consideration is the extent of justifiable reliance on the old rule by the party adversely impacted . National Association of Broadcasters v. FCC, 554 F.2d 1118, 1132 (D.C. Cir. 1976).

7. The Commission, itself, has previously acknowledged the existence of equitable interests established through reliance upon its rules and policies. DBS Report and Order, 11 FCC Rcd. 9712, 9740 (1995)(rejecting more restrictive rule because of industry investment in reliance upon earlier decision); Amendment of Parts 21 and 74, 10 FCC Rcd. 9589, 9631-32 (1995); Implementation of Section 309(j), 9 FCC Rcd. 7387, 7391 (1994)(according deference to applicants' reliance upon prior procedures); Anchor Broadcasting Limited Partnership, 7 FCC Rcd. 4566, 4568 (1992)(indicating that it would be improper to apply newly adopted or revised comparative criteria to pending comparative cases, as a result of the applicants' significant expenditures in reliance upon prior policy), citing, Bowen v. Georgetown University Hospital, 109 S. Ct. 468-477-78 (1988)

(Scalia, concurring); National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (2nd cir. 1974); General Telephone Company of the Southwest v. U.S., 449 F.2d 846, 864 (5th Cir. 1971)(discussing the reasonableness of rules having an impact on preexisting interests). Therefore, in light of its own prior recognition of the vested interests of applicants, as well as judicial recognition of such interests, the Commission's determination that the parties to pending comparative proceedings have no vested interest in having those proceedings resolved in accordance with their reasonable expectations, is contrary to law.

8. The Commission's determination that it is under no obligation to reimburse parties to comparative proceedings who have been adversely impacted is equally contrary to law. Whether considered as an obligation arising under the takings clause of the 5th Amendment or under the principles of detrimental reliance and fundamental fairness, the minimum obligation which the Commission faces in this instance is reimbursement the parties to comparative proceedings for expeditures reasonably and prudently incurred in accepting the Commission's invitation to participate and reliance upon the Commission's policies and affirmative representations.

9. Even if the Commission is correct that the action of Congress and the Commission in discarding prior policy in favor of a competitive bidding scheme is not impermissibly retroactive,

the law does not permit the adverse economic impact of such action to be visited solely upon upon the individual applicants who relied to their detriment in good faith upon the the old policy. The fundamental question the Commission must address is: why applicants, who accepted the Commission's invitation and expended substantial resources to participate in comparative proceedings intended to develop an evidentiary record upon which the Commission could select the applicant which would best serve the public interest, should be asked to bear the costs of such proceedings, when Congress subsequently determines that the public interest is served, not by selecting the best qualified applicant, but by an award to the highest bidder. The fact is that they should not and legally cannot.

10. The takings clause of the 5th Amendment specifically authorizes government action which creates adverse economic impact on individual citizens, provided such impact is visited for a public purpose and provided that the individual suffering such impact is justly compensated. The intention is to assure that, when property rights are taken for public use, it is the public, not the individuals whose rights are taken, that is obligated to pay the cost.

11. Contrary to the requirements of law, the Commission has erroneously taken the position that the public is entitled to induce applicants to expend significant sums of money in order that it may have the option of selecting the best qualified to assume the role of a public trustee of a broadcast license, while

incurring no obligation to reimburse those expenditures when it suddenly decides it would rather receive the proceeds derived from an auction of said license to the highest bidder. Accordingly, the Commission's refusal to justly compensate the victims of its action is contrary to law.

II. The imposition of a reserve price and minimum bid requirement does not serve the public interest.

12. While the Commission asserts in the First Report and Order (at para. 133-34) that the Balanced Budget Act of 1997 directed it to prescribe methods by which reserve prices and minimum opening bids would be established, that directive was explicitly made contingent upon a finding by the Commission that the imposition of reserve prices and minimum opening bids would serve the public interest. However, the First Report and Order is silent with respect to any basis for the Commission's conclusion that the public interest is served by such a practice.

13. There exist a number of reasons for concluding that the imposition of a reserve price and minimum bid requirements would disserve the public interest. Initially, neither the Commission nor its staff has the expertise to determine an appropriate reserve price, making such determination essentially arbitrary. Furthermore, inasmuch as authorizations in the broadcast service will be awarded by competitive bidding and that process will be open to wide participation, it may reasonably be expected to establish the fair market value of the authorizations so issued.

Finally, unless the authorization is awarded to the highest bidder, there will be no new station constructed, no new service to the public and no revenue derived for the public benefit. How the public interest is served by such an approach is difficult to comprehend.

14. The Commission has long recognized that the public interest is served by the initiation of new broadcast service. Congress has recently determined that the public interest also is served by the revenue derived from the award of authorizations by competitive bidding. However, neither interest is served when an authorization is withheld on the basis of an arbitrary reserve price. Accordingly, the Commission should eliminate the imposition of reserve prices and minimum bids in competitive bidding in the broadcast services.

III. An applicant who is the winning bidder should be relieved of the obligation to remit payment of the winning bid, where he/she is the only qualified applicant.

15. Section 309(j)(1) of the Communications Act, as modified by the Balanced Budget Act of 1997, requires that initial licenses and permits be awarded by competitive bidding to qualified applicants, where mutual exclusivity exists. Section 309(j)(6)(E) imposes on the Commission the obligation to utilize reasonable means to resolve mutual exclusivity among applicants, including threshold qualifications. Read together these provisions evidence the intent of Congress that authorizations be

awarded by competitive bidding only where there exists more than one qualified applicant. However, as indicated above, the procedures adopted by the Commission do not assure this outcome.

16. In order to assure the outcome intended by Congress, the Commission should adopt some reasonable procedure to be applied on a case by case basis whereby, upon petition by the winning bidder, it would consider evidence that the winning bidder is the sole qualified applicant and entitled to a grant by default. In cases in which such a demonstration is made successfully, the winning bidder should be relieved of the obligation to remit payment of its bid.

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